No. 416

IN THE

Supreme Court of the United States

October Term, 1948

UNITED STATES OF AMERICA,
Appellant,

v.

WALLACE & TIERNAN COMPANY, INC., *et al.*,
Appellees.

REPLY MEMORANDUM FOR APPELLEES

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SUBJECT INDEX

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There was error in the Appellant's failure to appeal from the final judgment of September 3, 1948, but the *Hoiness* decision of this Court has been handed down since our Statement and Motion were filed. That decision brushes aside such errors on appeal. As the error in question does not affect the merits of the Motion, we do not press the point.

The plaintiff is without legal right to appeal from the judgment.

(1) The judgment of dismissal was, at the plaintiff's own request, "*without prejudice*",—thereby reserving to the plaintiff the privilege and benefit of re-instituting suit and of excluding as a defense *res adjudicata*.

As set forth in our Original Memorandum (pp. 2, 12, 13), the plaintiff's counsel first suggested on April 20, 1948, that a judgment be entered "*with prejudice against the Government*"; but on May 24, and August 27; 1948, he requested and obtained a judgment "*without prejudice*". The plaintiff must have regarded as valuable and useful to it this benefit and privilege.

(2) The Appellant's statement (p. 4) that the District Court's conclusion that "the reality" was non-prosecution was based on one limited fact (viz., the admission of plaintiff's counsel as to the possibility of obtaining additional evidence) is not correct. The whole course of conduct of plaintiff's counsel in trying to obtain an artificial judgment by means of which it could in turn attempt to attack determinations which had already become conclusive, *res adjudicata*, and complied with in other actions and proceedings, formed the actual basis and reason for the Court's ruling.

(3) As set forth in our Original Memorandum (pp. 5-15), there never was a trial "in the usual sense of the word",—to quote the plaintiff's own assurance as to what would happen in the courtroom on June 2, 1948 (Tr. 4). "The Government does not intend to offer evidence if a date (for trial) is granted as we have requested" (May 24, 1948; Tr. 11).

Indeed, the plaintiff's counsel went so far as to assure the defendants at the opening on June 2nd that they need be ready with no defense, and that they would not be prejudiced if they adopted the role of spectators. It was on "that understanding" that the Court allowed the plaintiff's counsel to go forward with its prearranged pantomime to bring about a judgment of dismissal "without prejudice." (Our Original Memorandum, pp. 5-7.)

(4) For these reasons, the argument in the Appellant's brief (p. 4) that there *was* a trial in the usual sense of the term; that the plaintiff was proceeding in the court room with bona fide intention to prove a case; and that the judgment of dismissal "without prejudice", and hence with the right to sue anew, was not a judgment of nonsuit entered in accordance with the plaintiff's request, is contrary to the facts and is without merit in law.

(5) The elementary rule is thus stated in *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 Fed. (2d) 296, 297:

> "But, although a voluntary nonsuit is a final termination of the action, it has been entered at the request of plaintiff, and he may not, after causing the order to be entered, complain of it on appeal. For this reason, it is well settled in the federal courts that no appeal lies from a judgment of voluntary nonsuit. *U. S.* v. *Evans*, 5 Cranch, 280; 3 L. Ed. 101; *Evans* v. *Phillips*, 4 Wheat. 73, 4 L. Ed. 516; *Central Transportation Co.* v. *Pullman's Palace-Car Co.*, *supra*; *Francisco* v. *Chicago & Alton R. Co.* (C. C. A. 8th), 149 F. 354, 9 Ann. Cas. 628. And this is in accordance with the great weight of authority. See 2 *Am. Jur.*, Appeal and Error, p. 974; *Kempland* v. *Macauley*, 4 T. R. 436; *Ewing* v. *Glidewell*, 3 How. (Miss.) 332, 34 Am. Dec. 96; note, 9 Ann. Cas. 631-633, and cases there cited."

(6) The cases cited by the Appellant on page 7 were all cases where the judgment of nonsuit was not proposed, arranged and phrased by the plaintiff, but was at the

instance of the defendant or the court. For example, in *Wilson v. Republic Iron Co.*, 257 U. S. 92, the District Court had imposed upon the plaintiff certain costs which were not paid within the time fixed, with the result that the complaint was dismissed,—an obviously appealable judgment.

II

The underlying assumption in the Appellant's brief that it can use the civil action as a means for appealing from decrees which were made in other actions and proceedings and from which it did not appeal, is obviously without merit and is frivolous.

(1) The Appellant's Brief postulates that merely because, on June 2, 1948, at a so-called trial which its counsel announced would not be a trial "in the usual sense of the word" (Tr. 4), it unsuccessfully offered what it now calls evidence, it thereby secured the substantive right to conduct an appeal not merely nominal and frivolous.

As we have shown in our Original Memorandum, this so-called "evidence" was really no evidence at all (pp. 7-9). Irrespective of any question of legality or prior adjudication, it was immaterial, irrelevant and incompetent, and rightly excluded as such.

(2) But, aside from its inadmissibility for these reasons, the so-called evidence was clearly barred by reason of the fact that it was the very evidence which had been obtained by unconstitutional seizure and search and by unconstitutional process and was, therefore, inhibited to the Government,—precisely as the District Court had, by final decrees, determined in the so-called "Grand Jury Investigation," and in the action purportedly instituted by the "Indictment", and in the action instituted by the Criminal Information, and in the special proceeding for

the delivery to the defendants of the photostatic copies. (See our Original Memorandum, pp. 16-28.)

(3) Thus, by now claiming that it seeks to test the rulings excluding this inadmissible evidence at the nominal trial, the plaintiff is in effect seeking (under guise of appealing from a judgment entered in this civil action in accordance with its own planning and request and phrased for its own benefit), to bring up for review determinations made in other actions and proceedings from which it did not appeal, which it allowed to become final, which it complied with, and which, in the case of the basic determination, it itself has pronounced correct. (See our Original Memorandum, pp. 16-28.)

Obviously, this cannot be done; and any such attempted appeal is inadmissible, fictitious and frivolous.

(4) In addition to the judicial decisions cited in our Original Memorandum (pp. 32-33), we cite *Reed* v. *Allen*, 286 U. S. 191; *Ferrer* v. *Bank of Nova Scotia*, 135 Fed. (2d) 41, 42 (C. C. A. 1); *Hatchitt* v. *United States*, 158 Fed. (2d) 754, 755 (C. C. A. 9).

In the *Reed* case, *supra*, the United States Supreme Court said (p. 198):

> "It is hardly necessary to say that jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment."

This further language in the *Reed* case is directly applicable (p. 198):

> "The predicament in which respondent finds himself is of his own making, the result of an utter failure to follow the course which the decision of this court in *Butler* v. *Eaton*, *supra*, had plainly pointed out. Having so failed, we can not be expected, for his sole relief, to upset the general and well established

doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship. *United States* v. *Throckmorton*, 98 U. S. 61, 65, 68-69."

III

The Appellant's brief ignores entirely the legal consequences and corollaries in this action of the Appellant's own admission both in the District Court (Tr. p. 30, April 20, 1948) and in its Statement as to Jurisdiction (p. 3) that the District Court correctly determined that the so-called "Grand Jury Investigation" and the "Indictment" and the "Special Grand Jury" itself were not lawful or constitutional.

(1) In consequence, the decree to that effect, and all the determinations of law and fact implicit in that decree, have at all times since been final, undisputed and *res adjudicata* as between the same parties in all proceedings and actions.

The grand jury subpoenas *duces tecum*, which were part of that unconstitutional "Grand Jury Investigation" and in aid thereof, constituted compulsory production and were followed by both seizure and search of the papers: Furthermore, they were the taking of private property without due process. For both of these reasons, the acquisition by the Department of Justice of the information and evidence contained therein was unconstitutional. (See Our Original Memorandum, pp. 20-22; and *United States* v. *Cole*, 6 F. R. D., 581.)

Indeed, this Court has expressly held in *Wilson* v. *United States*, 221 U. S. 361, that a subpoena *duces tecum* in a criminal inquiry is violative of the constitutional Amendments unless issued by "duly constituted authority" (p. 382). See also *Fleming* v. *Montgomery Ward Co.*, 114 Fed. (2d) 382, 384 (C. C. A. 7).

Hence, such evidence so illegally secured "shall not be used *at all*". (*Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392.) It cannot be used in a civil action duplicating in subject matter the criminal proceeding in which it was obtained. (Our Original Memorandum, p. 28; and *United States* vs. *Phoenix Cereal Beverage Co.*, 65 Fed. (2d) 398, 399; C. C. A. 2.)

"The (Fourth) Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." (*Go-Bart Co.* v. *United States*, 282 U. S. 344, 357.)

"The amendment cannot be circumvented *by the indirect use* against the victim of evidence so obtained." (*Goldstein* vs. *United States*, 316 U. S. 114, 120.)

The character of a proceeding to redress an illegal seizure is determined by the relief sought and not by its title. (*Freeman* vs. *United States*, 160 Fed. (2d) 69 (C. C. A. 9.)

IV

The Appellant's memorandum also completely overlooks the conclusive character of Rule 41(e).

As set forth in *United States* v. *Janitz*, 6 F. R. D. 1, 2 (appeal dismissed 161 F. (2d) 19), this Rule in its preliminary drafts provided that the evidence illegally secured "shall not be admissible in evidence at any hearing or trial *of the proceeding in connection with which the seizure occurred.*"

The limitation italicized was finally eliminated. That elimination, as well as the comprehensive character of the language remaining, show conclusively that the order made on the motion provided for in that Rule is to be conclusive not only in the proceeding in which it was entered but "at any hearing or trial" where the inhibited evidence is offered.

Dated, December 2, 1948.

Respectfully submitted,

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